DOCUMENT RESUME

ED 070 972 CG 007 660

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TITLE Major Legal Aspects of Sex Education.
PUB DATE Nov 72
NOTE 19p.

EDRS PRICE MF-$0.65 HC-$3.29
DESCRIPTORS *Court Litigation; Ethical Instruction; *Family Life Education; Legal Responsibility; Parent Responsibility; *School Responsibility; *Sex Education; Teacher Responsibility

ABSTRACT

The legal status of sex education in the public schools in the United States as it existed at the close of the 1971-72 school year was investigated. The investigation included surveys, analyses, and interpretations of statutes, significant rules and regulations of state departments of education, and court holdings as they applied specifically to sex education. Investigation and analyses of the court cases involving sex education indicated that the courts are not in accord on the question of an inherent parental right to instruct in matters of morality and religion. It appears that the courts will support the right of school authorities to establish curriculum in sex education, family life, or human sexuality so long as it is not arbitrary, capricious, unreasonable, or in violation of state or federal laws or constitutions. The courts will also uphold the individual constitutional right to excusal from such instruction on the grounds of invasion of religious freedom or personal morality. (Author/WS)

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MAJOR LEGAL ASPECTS OF SEX EDUCATION

by

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Organized opposition to Sex Education in the public schools of the United States has flared and subsided sporadically in recent years. There has been no apparent pattern to the controversial attacks which have exploded here and there across the country from Parsippany, New Jersey and Bexley, Ohio, to San Mateo and Anaheim, California.

During the 1968-69 school year, rising concern and increased activity on the part of the forces of opposition resulted in moratoriums on sex instruction in some states while others considered or took legislative action to restrict or to control such school programs. The slightest suggestion of public instruction in sex education has been enough to evoke prohibitory legislation. Sporadic attempts to enact enabling legislation have been enthusiastically endorsed on the one hand and vehemently denounced on the other by ideologically opposed groups of parents and citizens.

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For some protagonists the individual right to examine all aspects of human life is the basis for public sex education. Some practical supporters see the need for sex education as a socially significant answer to needless tragedy such as unwanted pregnancies and incidence of venereal disease. Reputable organizations on record as supportive of sex education include: American Association for Health, Physical Education and Recreation (AAHPER); American College of Obstetricians and Gynecologists (Committee on Maternal Health); American Medical Association; American Public Health Association (Governing Council); National Congress of Parents and Teachers; National Council of Churches of Christ in the U.S.A.; National Education Association; National School Boards Association; American Association of School Administrators; YMCA; YWCA; Synagogue Council of America; United States Catholic Conference; United States Department of Health, Education and Welfare.[1]

Many major opponents of public sex education assert that it is primarily a parental function and that public instruction imposes a state selected moral code upon individual citizens in violation of the establishment clause of the First Amendment to the United States Constitution. Some of the groups working toward the elimination of sex education in the schools are: The Liberty Lobby; Sanity on Sex (SOS); Mothers Organized for Moral Stability (MOMS); People Against Unconstitutional Sex Education (PAUSE); Parents Opposed to Sex and Sensitivity Education (POSSE); Citizens for Parental Control;

Parents for Orthodoxy in Parochial Educaton (POPE); Citizens for Parental Control; Citizens Committee of California; Truth About Civil Turmoil (TACT); Southwest Church of the Air; United Republicans of California; Arizona Committee for Responsible Education (ACRE); People Opposed to (compulsory) Sex Education (POSE); We, The People, and other unnamed organizations that denounce sex education as an ominous sign of moral degeneracy in our society. MOTOREDE (Movement to Restore Decency) committees have roots in the John Birch Society, and, among other things, they actively propose to, "prevent the introduction of the carefully plotted program of sex education into more school systems, and to get it removed from those that already have it."[2]

A voluntary, non-profit organization founded in 1964, SIECUS (Sex Information and Education Council of the United States) contributed to the dichotomy in the sex education issue.

> Founded by six representatives from several disciplines and professions, SIECUS has acted in a consultative capacity, emphasizing the need of each community to move deliberately in implementing local sex education programs, to involve community leaders in supporting roles, to scrutinize with care all materials used in the school programs, to train competent teachers, and to construct appropriate curricula. As a result of the efforts and with the aid of SIECUS, many communities, churches and school boards were able by 1968 to establish or improve sex instruction programs.[3]

So, the battle lines have been drawn by opposing groups and individuals. Although the protestors apparently represent a minority viewpoint, and it is obvious that some

of the organized opposition groups have other vested interests,the fact remains that citizens and taxpayers today are questioning, more and more, every aspect of the school program. It was inevitable that the courts would be drawn into the maelstrom of conflicting views on the issue of sex education in the public schools. Basic issues to be resolved by the courts appear to be the constitutional limits of proscriptive, mandatory, and elective sex education legislation. Questions which arise are: (1) Is mandatory sex education in the public school curricula constitutionally permissible? (2) Is proscriptive sex education legislation constitutional? (3) Is voluntary elective sex education in the school program constitutional?

Inherent in this problem is the question of the rights of parents to determine certain aspects of the life of their child. Can the school legally assume the responsibility for the instruction of the child in such a vital and delicate subject? May a student be rightfully excluded from such instruction and, if so, for what reasons? Is the instruction of youth in sex education such an essential need of society today that this need supersedes the rights of the individual in that society? The polarization of opinion and the increased probability of conflict on this issue indicate a need for clarification of the legal aspects of sex education in the public school domain.

This research investigated the present legal status of sex education in the public schools of the United States

as it existed at the close of the 1971-72 school year. The question of the propriety of sex education as a part of the public school curriculum was considered only as it related directly to administrative, statutory, or case law. The study was confined to administrative rules, legislative enactments, and court decisions which specifically forbid, require, or regulate instruction in sex education in the public schools.

Constitutional Aspects

As a form of law Constitutions are usually broad and general in nature. They are not intended to circumscribe the fine points of the daily operation of the governments they espouse. On the question of sex education in the schools the Constitution of the United States does not specify any proscription, prescription, or limitation. Matters of education, general and specific, are delegated to the states.

Constitutional questions have been posed in all of the sex education court cases as to the rights and freedoms of the individual citizen in juxtaposition to the interests of the state. The "establishment" and the "free exercise" clauses of the First Amendment of the United States Constitution are most often invoked as supporting the rights of the individual in the sex education cases. The plaintiffs complain of a violation of their religious freedom as a result of the instruction received by their children in sex education classes. Another claim has been

that the implementation of sex education courses in the school curriculum amounts to an establishment of religion in the sense that it promotes the theory of no religion. The plaintiffs contend that moral and spiritual tenets should properly be a part of training in human sexuality and that sex education, therefore, cannot be a part of the school curriculum if the separation of church and state is to be maintained.[4]

The "due process" clause of the Fourteenth Amendment has also been exposed to court scrutiny in the sex education cases.[5] It has been alleged that the plaintiffs' rights to due process have been violated because the sex education courses were established and operated in the school without their prior knowledge or consent.

Plaintiffs have also claimed that sex education courses are unconstitutional in that these programs violate the personal liberty of a parent to determine the education of the child.[6]

Violation of the Ninth Amendment was claimed in two of the cases on the basis that the People, acting through the legislature, had not empowered the defendant school board to carry on such a program.[7]

Plaintiffs in these same two cases also alleged a violation of the Tenth Amendment on the grounds that authority to conduct the program was not granted to the local districts by the state constitutions nor by legislative provisions, thereby reserving the authority to instruct children

in sex education to the people.

The state constitutions, while making provisions for the instruction of children in some specific subjects, have not included sex education among the requirements nor have they prohibited such instruction. Nevertheless, it has been alleged that defendants have violated state constitutional provisions in some cases.[8]

Statutory Aspects

On the federal level there is no statutory provision for prohibiting, permitting, or mandating instruction in sex education in the public schools of the United States. The delegation of responsibility and authority for educational matters is basically committed to the states. Recently, some federal grants for funding have placed some requirements or limitations on local educational programs, but these are administrative rather than statutory in nature.

The state legislatures have plenary powers over the educational programs of the states. Corpus Juris Secundum is explicit in the description of the authority of state legislative bodies in educational matters:

> Subject to constitutional provisions, the power of the legislature as to the management, operation and regulation of school districts is plenary; local regulations and charter provisions as to school matters must conform to constitutional and statutory provisions.[9]

Some state legislative bodies have accepted the responsibility and have assumed the authority to determine

school programs in much more specific ways than others.

With the exception of Michigan[10] none of the state legislatures had invoked their authority to prescribe, proscribe, or limit sex education programs in the schools before 1967. Since that time the legislatures of Florida[11] and of Louisiana[12] have moved to prohibit family life and sex education instruction in the schools of their respective states. Michigan, Illinois, and Idaho have enacted legislation which permits and even encourages the establishment of sex education programs in the public schools.[13] The California legislature has provided for the teaching of sex education courses with some exacting and limiting factors.[14] The law making bodies in Tennessee have provided for penalties if such courses and the materials used in the instruction are not carefully screened and approved by state and local boards of education.[15] Most of this legislation also provides for the exemption of individual students from participation in the prescribed classes. The New Jersey legislature proclaimed a moratorium on sex education courses in schools of the state in 1969 and in the following year, 1970, rescinded that action after investigation and deliberation.[16]

Litigation in the higher courts on this issue of sex education in the schools has not occurred where the legislatures have enacted laws to deal with it. The recent nature of existing legislation might indicate that legislatures of other states might soon consider the establishment of some statutory guidelines for educators on the issue.

Administrative Aspects

At least twenty-one of the fifty state departments of education have issued policy statements or guidelines for local boards of education on the subject of sex education or family life instruction in the public schools. The rationale for such action is clearly enunciated in a document issued by the Pennsylvania Department of Education:

> There seems to be little question that sex education is a responsibility which should be shared by the home, church, school and community. Yet it appears clear that the school has a fundamental role to perform. In a concerned effort to assist young people to confront the physiological, psychological, social and ethical implications of sexuality, the schools must share a definite responsibility for assuring that opportunities prevail through which accurate information and trained leadership are available. Central to such responsibility are opportunities to make responsible choices based on facts relative to competing codes of conduct, the implications of one's sex role, and the standards, attitudes and ideals which combine to form one's self-concept and personal behavior. Therefore, sex education is implicit in the school's commitment to the development of the whole personality.[17]

Some of the State Department of Education edicts have been mandatory in nature such as those of Connecticut, Idaho, Maryland, New Jersey, and Oregon which require the teaching of family life and/or sex education in some form in the school curriculum.[18] Most often the statements have been in the form of encouragement and support for the establishment of such programs as in Arizona, Michigan, New Hampshire, North Carolina, Pennsylvania and Virginia.[19]

Nebraska and Virginia State Boards of Education guidelines prohibit the teaching of the reproductive system

of the human body in co-educational classes, thereby requiring the establishment of separate courses in sex education.[20] Conversely, several others specifically proscribe the teaching of sex education in separate courses but instead require that it be integrated into other areas of the curriculum.[21]

The Indiana State Board of Education and the Nebraska State Board of Education have specifically warned local districts against the use of SIECUS materials in their sex education classes.[22] The fact that SIECUS does not actually produce materials for use in the classroom but is, rather, an advisory council seems to have escaped their notice.

Many of the state board of education guidelines require the employment of specially trained personnel in the operation of sex education and family life programs.[23] A few departments make provisions for State Colleges to provide for such training of personnel.

Numerous state board regulations require that local boards of education provide for the excusal from instruction of pupils who request such exemption and some boards demand that parental approval for instruction in sex education must be in writing.[24]

The Nebraska State Department of Education requires that only married teachers may serve as instructors in sex education courses in the public schools until such time as specially trained personnel is available.[25]

Most of the state departments provide guidance and assistance for local boards in the implementation of sex education programs. They also leave the decision as to the

establishment of such courses to the discretion of the individual local school community. It is notable that in each of the court cases involving sex education in the public schools the State Department of Education in that state has issued statements on the subject and the policy and position of the state on the subject have been in contention.

Judicial Aspects

Since the law is what the court says it is, the judicial aspects of sex education in the public schools of the United States are even more significant than the statutory provisions or the administrative rules and regulations which proscribe, prescribe, or limit the content of such courses. Interpretation by the courts of the constitutionality and the legality of such statutes and of rules governing the actions of local districts is, in reality, the determining factor in the ultimate operation of sex education courses in the schools.

Five cases dealing specifically with sex education in the public schools have been adjudicated in the United States. These are: Valent v. New Jersey State Board of Education; Cornwell v. State Board of Education (Maryland); Clemmer v. Unified School District #501 (Kansas); Medeiros v. Kiyosaki (Hawaii); and Hobolth v. Greenway (Michigan).[26] The Cornwell case, appealed to the Supreme Court of the United States, was denied a hearing by that court. All of these cases have been litigated since 1969. The recency of the litigation in this particular field of school curriculum

would lead one to believe that the issue will arise again before it becomes settled as a point of law. It is an extremely emotion-provoking issue--one which arouses intense pro and anti sentiment--and also a problem which attracts fanatical pressure groups. It is these kinds of issues which historically have been brought to bar again and again. The landmark "flag salute" cases are superb examples of the effect of deep sentiment and patriotic fervor upon the judgments of the courts.[27] The courts are not unresponsive to the temper of the times. Therefore, it is difficult to predict precisely what the social milieu may hold for the future for sex education in the schools of the land.

Two major legal issues have been contested in the sex education suits. One is the constitutional question of the violation of the rights of the individual under the First and Fourteenth Amendments. The other challenges the authority of school officers to establish and operate courses in sex education and family life instruction in the local school.

On the first question, the courts in Cornwell, Hobolth, Clemmer, and Medeiros have held that the constitutional rights of the individual plaintiffs were not violated in the implementation and the operation of such courses in the public schools. These courts supported the defendant school boards in holding that the plaintiffs' right to free exercise of their religion was not violated nor could the teaching of sex education be regarded as an establishment of religion. Neither had the plaintiffs' right to due process been violated

in any of the cases in the opinion of the courts.

The Valent court in New Jersey, on the other hand, held the defendant school board to have violated the constitutional rights of the plaintiff with respect to the free exercise clause of the First Amendment. In this case the court said that the state may not require attendance at such classes. The court did not deny the right of the school authorities to offer the course in human sexuality but did deny the right of the state to compel attendance. The court said that individuals must be excused from participation on the claim of the right to free exercise of their religion. School board policy in the other cases did allow for exemption from the controversial instruction.

In Michigan, as recently as October of 1972, the Hobolth court found that the sex education program in the Howell public schools was not a substantial invasion of state or federal constitutional rights of the plaintiffs even though the course might be distasteful to them. The court did find, however, that the enrollment procedures in the sex education courses were defective and resulted in students being enrolled in such courses without the knowledge and/or consent of their parents. The defendant school board was ordered, in this case, to provide that no student be enrolled in any sex education course unless that student's parent or parents authorized such enrollment.

The other major legal issue in the sex education cases has been the question of authority and responsibility

for state and local school officials to establish and to conduct sex education and/or family life courses. This has not been as difficult a question for the courts to decide since precedent has been established early and often as to the rights of state and local school authorities to determine the content of the school program. Much evidence may be cited from prior court holdings on this question with regard to many facets of the school curriculum. The courts are just now being asked to deliberate the sex education issue in light of earlier curricular decisions. On this particular point of law the courts have been inclined to rely on the precedent established most often that the school authorities do indeed have the right, as well as the responsibility, to establish curriculum and to determine the school program.

The courts have tried, of course, to treat the sex education question rationally rather than emotionally. For example, the Cornwell court regarded the courses in sex education as a public health measure and the Clemmer court perceived the courses as related to the public welfare, thereby placing them in the category of being necessary for the public good. The Maryland court also held that sex education courses should properly apply to non-pregnant as well as to pregnant pupils. The Supreme Court of Hawaii, in the Medeiros case, viewed sex education instruction as one of the significant measures to be taken by the state to solve social problems. Actually, the courts have held that sex education courses have a rightful place in the school domain so long as they are reasonable and are administered fairly and judiciously.

Conclusion

The prime intention of this research was to determine the present legal status of sex education in the public schools of the United States. It has not been the purpose to take a position on any side of the controversial issues revolving around sex education in the schools, but rather, to analyze and clarify those issues.

The study indicated that the courts will support the right of school authorities to establish curriculum so long as it is not arbitrary, capricious, unreasonable or in violation of state or federal laws or constitutions. As long as such courses are in the interest of the welfare and the safety of the citizens and of the state the courts will sustain them. It was found that a few state legislatures have enacted specific legislation governing sex education courses in the schools. It was also evident that many more state boards of education have issued policy statements and/or rules and regulations governing instruction in sex education in the absence of statutory rulings. A significant finding was that in addition to supporting the right of school officials to inaugurate and operate courses in sex education the courts will apparently uphold the individual constitutional right to excusal from such instruction on the grounds of religious belief or conscience.

The ancient Greek philosopher, Heracleitus, has been quoted as saying, "There is nothing permanent except change."[28] This process of change has moved iconoclastically into the

arena of public education in recent years. The sex education issue is only one of the many issues not yet resolved. Protests and concerns about the topic will most certainly continue to appear since the population of parents of school children is continually changing and fluctuating. It is by no means a stable group. As the pendulum of public opinion continues to swing, certainly the views on sex education will continue to change and assuredly the legislatures and the courts will be called upon to legislate and to mediate the differences. The question of sex education as a proper part of the school curriculum will undoubtedly remain at issue for some time to come.

Footnotes

[1] Joanne Zazzaro, "Americans Do Support Sex Education," The American School Board Journal, CLVII (September 1969), p. 30.

[2] Ibid, p. 13.

[3] "Sex Education: The Constitutional Limits of State Compulsion," 43 So.Cal.L.Rev. 548 (1970).

[4] Valent v. New Jersey State Board of Education, 274 A.2d 832 (1971); Cornwell v. State Board of Education, 314 F.Supp. 340 (1969).

[5] Clemmer v. Unified School District #501, Case Number 112,064 District Court of Shwnee County, Kansas (1970); Cornwell supra Note 4; Valent supra Note 4.

[6] Medeiros v. Kiyosaki, 478 P.2d 314; Clemmer supra Note 5.

[7] Clemmer supra Note 5; Valent supra Note 4.

[8] Clemmer supra Note 5; Valent supra Note 4; Medeiros supra Note 6.

[9] Corpus Juris Secundum, Schools and School Districts, p. 812 sec. 83a.

[10] Michigan, P.A. 1919, No. 274, Sec. 2.

[11] Fla. Stat. Ann. Sec. 233.067 (8) (1970).

[12] La. Rev. Stat. sec. 17:281 (1970).

[13] Mich. Comp. Laws Ann. sec. 340.789 (1968); Ill. Rev. Code sec. 122.27-9.1 (1969); Idaho Rev. Stat. sec. 33-1609, 1611 (1970).

[14] Cal. Code Ann. Education Ch. 3, sec. 8506 (1969).

[15] Tenn. Rev. Stat. sec. 49.1924 (1969).

[16] Carl L. Marburger, Commissioner of Education, "Memorandum on REPORT to the Legislature by the Senate and Assembly Committees on Education concerning Sex Education in the Public Schools (Pursuant to Assembly Concurrent Resolution No. 69 of 1969)," (Trenton, N.J.: State Department of Education, July 27, 1970).

[17] Guidelines for SEX EDUCATION in Public Schools of Pennsylvania, Pennsylvania Department of Education, Harrisburg, Pa., 1969.

[18] Connecticut State Board of Education, "Policy Statement on Family Life and Sex Education for Connecticut Schools," Hartford, April 1968. (Mimeographed.); Idaho State Department of Education, "Family Life and Sex Education - Resolution," Boise, October 23-24, 1969. (Mimeographed.); Marburger supra Note 16; Maryland State Department of Education, Bylaw 321:1 Family Life and Human Development, January 1970; Oregon Board of Education, "Policy Statement on Sex Education," Salem, Oregon, August 21, 1970. (Mimeographed.).

[19] Arizona State Board of Education, "Recommendations and Guidelines on Sex Education," Tucson, 1971. (Mimeographed); Michigan Department of Education, Sex Education and Family Information, Lansing, 1971; New Hampshire State Board of Education, "Policy Statement Relating to a Comprehensive Health Education Program," Adopted February 11, 1970. (Mimeographed.); North Carolina State Department of Public Instruction, "Sex Education - A Policy Statement," Raleigh November 1968, Publication No. 422; Pennsylvania supra Note 17; Virginia State Board of Education, "Report on Sex Education," Richmond, August 19, 1970. (Mimeographed.).

[20] Nebraska State Board of Education, Resolution, Omaha, December 17, 1970. (Mimeographed.); Virginia supra Note 19.

[21] Arizona supra Note 19; Connecticut supra Note 18; Florida Department of Education, "Position Statement on Family Life and Sex Education," Tallahassee, November 2, 1969. (Mimeographed.); Idaho supra Note 18; Kansas State Board of Education, "Guidelines for Sex Education in Public Schools of Kansas," Wichita, January 1970; Pennsylvania supra Note 17 ; Virginia supra Note 19.

[22] Indiana State Department of Education, "Report of the Committee on Sex Education," p. 4, 1970; Nebraska supra Note 20.

[23] Connecticut supra Note 18; Delaware State Department of Public Instruction, "Family Life and Personal Living: Guiding Principles," Dover, February 25, 1970. (Mimeographed.); Florida supra Note 21; Idaho supra Note 18; Kansas supra Note 21; Maryland supra Note 18; Michigan supra Note 19; North Carolina supra Note 19; Oregon supra Note 18; Pennsylvania supra Note 17.

[24] Arizona supra Note 19; Nebraska supra Note 20; Oklahoma State Superintendent's Newsletter, Vol. X, No. 6, Oklahoma City, February, 1970. (Mimeographed.); Washington State Office of Public Instruction, "Suggested Guidelines for Including Sex Education in School Curricula," Olympia, January, 1970.

[25] Nebraska State Board of Education, Resolution, Omaha, April 11, 1969. (mimeographed.).

[26] Valent supra Note 4; Cornwell supra Note 4; Medeiros supra Note 6; Hobolth v. Greenway, File No. 1323, Circuit Court for the County of Livingston, State of Michigan.

[27] Board of Education of Minersville School District v. Gobitis, 310 U.S. 586, 60 S.Ct. 1010 (Pa. 1940); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 (W.Va. 1943).

[28] Burton Stevenson, ed., The Macmillan Book of Proverbs, Maxims, and Famous Phrases (New York: The Macmillan Company, 1948), p. 315. "All things make room for others and nothing remains still." HERACLEITUS, Maxim, (c. 500 B.C.). As quoted by Plato, Cratylus, sec. 402a. Rogers, Students' History of Philosophy, p. 15, quotes Heracleitus as saying, "There is nothing permanent except change."